

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT J. SMITH,	§
	§ No. 515, 2008
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0312008370
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 24, 2009

Decided: June 15, 2009

Before **HOLLAND, BERGER** and **JACOBS**, Justices

**ORDER**

This 15<sup>th</sup> day of June 2009, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Albert J. Smith, filed an appeal from the Superior Court's October 2, 2008 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In February 2005, Smith was found guilty by a Superior Court jury of two counts of Attempted Murder, one count of Attempted Robbery, and two weapon offenses. He was sentenced to life imprisonment, plus an

additional 45 years. Smith's convictions were affirmed by this Court on direct appeal.<sup>1</sup>

(3) In this appeal from the Superior Court's denial of his motion for postconviction relief, Smith claims that his counsel provided ineffective assistance at trial and in his direct appeal. Specifically, he argues that his counsel failed to properly object at trial, first, to an incriminating letter that the prosecution produced in an untimely fashion; second, to his absence during a portion of jury selection; and, third, to his forced appearance at trial in prison garb. In addition, he complains that his counsel failed to raise those issues on direct appeal. To the extent that Smith fails to present claims that were raised previously, those claims are deemed to be waived and will not be addressed by this Court.<sup>2</sup>

(4) In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>3</sup> Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong

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<sup>1</sup> *Smith v. State*, 902 A.2d 1119 (Del. 2006).

<sup>2</sup> *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his postconviction motion in the Superior Court, Smith also claimed that his counsel was ineffective by failing to retain experts who would question his competence to stand trial.

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

presumption that the representation was professionally reasonable.”<sup>4</sup> The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.<sup>5</sup>

(5) Smith first claims that his counsel failed to appropriately object to an incriminating letter produced in an untimely fashion by the prosecution.<sup>6</sup> The record reflects that, at trial, Smith’s counsel raised a number of objections concerning the letter, but, ultimately, grounded his objection on the State’s untimely production of the letter, which prevented the retention of a handwriting expert, thereby prejudicing Smith’s case. Even assuming that Smith’s attorney did not make the appropriate objection regarding the letter, there was eyewitness testimony from three individuals, including the victim, the co-defendant, and an independent witness, supporting Smith’s convictions. Thus, even without the letter, there was more than sufficient evidence of Smith’s guilt and, as such, any claim of prejudice must fail. We, therefore, conclude that Smith’s first claim is without merit.

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<sup>4</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>6</sup> The letter was written to a co-defendant by Smith while Smith was in prison awaiting trial. The co-defendant later agreed to plead guilty and testify against Smith. The letter was found in the co-defendant’s room by his mother, who turned it over to the prosecutor.

(6) Smith next claims that his counsel should have objected to his absence during a portion of jury selection. This claim is without a factual basis, since the record reflects that Smith was present for all phases of the jury selection process except for that portion where the judge excused the members of the venire who were unable to serve due to hardship. When the jury was impaneled, Smith was present, as was constitutionally required.<sup>7</sup> As such, we conclude that Smith's second claim is without merit.

(7) Smith's third claim is that his counsel violated his rights by failing to object to his forced appearance at trial in prison garb. This claim also is without a factual basis, since nothing in the record reflects that Smith was forced to wear prison garb during the trial. Rather, the record reflects that, on the morning of trial, Smith requested a continuance so that he could engage private counsel. He was dressed in prison attire at that time as a way of demonstrating to the judge that he and his appointed counsel were not prepared for trial. When the judge denied Smith's motion for a continuance, Smith made no motion to delay the trial until he could change his clothing. After the first day of trial, Smith appeared in street clothes. In the absence

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<sup>7</sup> Super. Ct. Crim. R. 43(a); *Shaw v. State*, 282 A.2d 608, 609-10 (Del. 1971).

of the element of compulsion, there was no constitutional violation.<sup>8</sup> We, therefore, conclude that Smith's third claim is without merit.

(8) Smith's fourth, and final, claim is that his counsel failed to raise any of these claims in his direct appeal. Because none of Smith's claims is meritorious, he can demonstrate no prejudice as a result of his attorney's failure to raise those claims on direct appeal. As such, we conclude that this claim, too, is without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>8</sup> *Estelle v. Williams*, 425 U.S. 501, 512 (1976).